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NO. ~~070046~~
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DAVID EDDIE COWAN,

Petitioner,

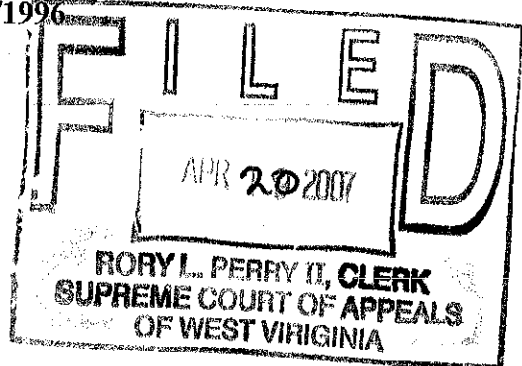
v.

CLAIM NO. 970029573

DOI: 11/20/1996

JANE CLINE, INSURANCE COMMISSIONER.
STATE OF WEST VIRGINIA, AND BRICKSTREET
ADMINISTRATIVE SERVICES, Acting as the Third
Party Administrator on behalf of the Insurance
Commissioner,

Respondents.



RESPONDENT BRICKSTREET ADMINISTRATIVE SERVICES' RESPONSE
IN OPPOSITION TO PETITIONER'S
PETITION FOR WRIT OF MANDAMUS

BrickStreet Mutual Insurance Company d/b/a BrickStreet Administrative Services opposes petitioner's petition for writ of mandamus on the basis, *inter alia*, that it is a private entity not subject to writs of mandamus. Although never served with petitioner's petition, BrickStreet submits the following:

I. Introduction

From 1913 until December 31, 2005, the State of West Virginia operated a state-run monopolistic workers' compensation insurance system. Known by various names throughout its existence, the final agency to operate this monopolistic insurance system was the West Virginia Workers' Compensation Commission ("Commission").

In 2003, the Legislature passed and then Governor Wise signed into law SB 2013, which substantially reformed the states' workers' compensation system. SB 2013 was

immediately implemented in July, 2003, and the cash flow position of the system began to immediately improve. This improving cash flow position was ensured when this Court issued its decision in *Wampler Foods, Inc. v. Workers' Compensation Division*, 216 W.Va. 129, 602 S.E.2d 805 (2004), effectively permitting the immediate implementation of SB 2013.

II. SB 1004

Governor Joe Manchin was elected governor in November, 2004, during the cash flow turn around of the state's workers' compensation system. In January, 2005, and within days of being inaugurated, Governor Manchin called a special session of the Legislature and SB 1004 was passed in 5 days.

SB 1004 accomplished 2 primary things. First, it effectively closed the state system as of June 30, 2005, put all claims with a date of injury/last exposure on or prior to that date into an "Old Fund," and identified a funding mechanism to pay the claims in this legacy run-off fund. See generally, W.Va. Code §23-2C-1, *et seq.* Second, it required that calendar year 2005 be spent forming an employer owned mutual insurance company that would begin to write the entire book of workers' compensation insurance in West Virginia on January 1, 2006. W.Va. Code §23-2C-3 and 15.

The employer owned mutual insurance company required to be created by SB 1004 was incorporated in March, 2005, as the West Virginia Employers' Mutual Insurance Company. The company did not begin writing insurance until January 1, 2006 and now operates as BrickStreet Mutual Insurance Company ("BrickStreet").

Upon finding that BrickStreet had been created and that the system otherwise had been adequately prepared for privatization, Governor Manchin issued a Proclamation on

December 8, 2005 proclaiming that “the Workers’ Compensation Commission shall terminate on the thirty-first day of December two thousand five, at 11:59 p.m..”

Respondent’s Exhibit 1 at ¶ 6. From that point forward, BrickStreet was to be the sole writer of workers’ compensation insurance in West Virginia until July 1, 2008, when other licensed carriers will be permitted to write workers’ compensation in West Virginia. W.Va. Code §23-2C-15(b).

III. Administration of the Old Fund

As mentioned above, all workers’ compensation claims with dates of injury or last exposure on or before June 30, 2005, remained liabilities of the State of West Virginia and were placed into the “Old Fund.” W.Va. Code §23-2C-2(m) and 6. The Office of Insurance Commissioner (“OIC”) oversees the Old Fund. Pursuant to Legislative mandate found at West Virginia Code Section 23-2C-16, BrickStreet (through a d/b/a called BrickStreet Administrative Services) entered into a contract with the OIC to administer the Old Fund claims. Ultimately, the administration of these Old Fund claims will be bid out by the State and likely transferred to a third party administrator other than BrickStreet Administrative Services.

In the present matter, petitioner’s workers’ compensation claim is an Old Fund claim being administered by BrickStreet Administrative Services and Cambridge Integrated Services, Inc., a subcontractor to BrickStreet. Although BrickStreet has never been served with the petition for writ of mandamus, it nevertheless responds in this pleading.

IV. Discussion

“Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” Syllabus Point 1, *State ex rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W.Va. 207, 151 S.E.2d 102 (1966)(emphasis supplied). In *Hickman v. Epstein*, 192 W.Va. 42, 450 S.E.2d 406 (1994) this Court emphasized that a mandamus only lies against a public entity, and not a private entity.

The Court wrote as follows:

The function of a writ of mandamus is to enforce the performance of official duties arising from the discharge of some public function, or imposed by statute. City of Huntington v. Huntington Wharf & Storage Co., 75 W. Va. 183, 83 S.E. 500, 501 (1914). Except where public interests are involved, a writ of mandamus is not an available remedy between two private persons to enforce a purely private right, duty, or contract. See 52 Am. Jur. 2d Mandamus § 104 (1970); Annotation, Mandamus Against Unincorporated Associations or its Officers, 137 A.L.R. 311 (1942). The law in West Virginia has been settled for over one hundred years that a writ of mandamus does not lie against a private person who is not a public or quasi-public officer. Heath v. Johnson, 36 W. Va. 782, 15 S.E. 980 (1892).

Hickman v. Epstein, 192 W.Va. 42, 450 S.E.2d 406 (1994).

SB 1004 made it abundantly clear that BrickStreet is not a governmental agency or body but rather is a private entity. The Legislation reads as follows:

- (c) For the duration of its existence, the company **is not and shall not be considered a department, unit, agency, or instrumentality of the state for any purpose**. All debts, claims, obligations and liabilities of the company, whenever incurred, shall be the debts, claims, obligations and liabilities of the company only and not of the state or of any department, unit, agency, instrumentality, officer or employee of the state.
- (d) The moneys of the company are not and shall not be considered part of the general revenue fund of the state. The debts, claims, obligations and liabilities of the company are not and shall not be considered a debt of the state or a pledge of the credit of the state.
- (e) The company is not subject to provisions of article nine- a,

chapter six of this code; the provisions of chapter twenty-nine-b of this code; the provisions of article three, chapter five-a of this code; the provisions of article six, chapter twenty-nine of this code; the provisions of article six-a of said chapter; or the provisions of chapter twelve of this code.

W.Va. Code §23-2C-3.

In addition to expressly stating that BrickStreet is not and shall not be considered a department, unit, agency, or instrumentality of the State, the Legislative intent to create a private sector mutual insurance company was clearly expressed as follows:

- (7) An employers' mutual insurance company or a similar entity has proven to be a successful mechanism in other states for helping employers secure insurance and for stabilizing the insurance market;
- (8) There is a substantial public interest in creating a method to provide a stable workers' compensation insurance market in this state;
- (9) The state-run workers' compensation program is a substantial actual and potential liability to the state;
- (10) There is substantial public benefit in transferring certain actual and potential future liability of the state to the **private sector** and creating a stable self-sufficient entity which will be a potential source of workers' compensation coverage for employers in this state;
- (11) A stable, financially viable insurer in the **private sector** will aid in providing a continuing source of insurance funds to compensate injured workers;

* * *

(a) On or before the first day of June, two thousand five, the executive director may take such actions as are necessary to establish an employers' mutual insurance company as a **domestic, private, nonstock, corporation** to:

- (1) Insure employers against liability for injuries and occupational diseases for which their employees may be entitled to receive compensation pursuant to chapter twenty-three of this code and federal Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §901, *et seq.*;

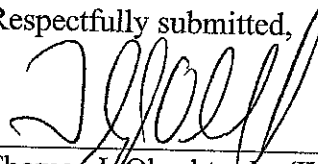
W.Va. Code §23-2C-1; W.Va. Code §23-2C-3(emphasis supplied). See also, Reespondent's Exhibit 1 at WHEREAS para. 8 stating that SB 1004 "provided for the privatization of West Virginia's State-run workers' compensation system."

In light of the foregoing, it is overwhelmingly clear that the Legislative intent was to create a private sector mutual insurance company ultimately called BrickStreet. To emphasis that intent, the Legislature provided that BrickStreet was not a department, unit, agency, or instrumentality of the State. Accordingly, BrickStreet is not subject to petitioner's mandamus proceeding.

Finally, BrickStreet would note that a finding that it is not subject to a writ of mandamus is not fatal to petitioner's potential remedy. Certainly if the elements necessary for a writ of mandamus to issue were met by petitioner, this Court could simply order the OIC to direct BrickStreet to act as directed by this Court. Accordingly, petitioner is not harmed by a finding that BrickStreet is not subject to a writ of mandamus.

WHEREFORE, BrickStreet respectfully requests that the petitioner's Petition not be accepted by this Court.¹

Respectfully submitted,



Thomas J. Obrokta, Jr. (W.Va. Bar #6645)
BrickStreet Mutual Insurance Company
4700 MacCorkle Ave., S.E.
Charleston, WV 25304
304-926-3435 (phone)
304-926-5372 (facsimile)

¹ Upon review of Commissioner Cline's "Separate Motion to Dismiss and Separate Answer and Affirmative Responses to Petitioner's Petition for Writ of Mandamus," BrickStreet hereby adopts the substantive grounds for denial of the petition as set forth in that pleading.

NO. 070846
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DAVID EDDIE COWAN,

Petitioner,

v.

CLAIM NO. 970029573
DOI: 11/20/1996

JANE CLINE, INSURANCE COMMISSIONER.
STATE OF WEST VIRGINIA, AND BRICKSTREET
ADMINISTRATIVE SERVICES, Acting as the Third
Party Administrator on behalf of the Insurance
Commissioner,

Respondents.

CERTIFICATE OF SERVICE

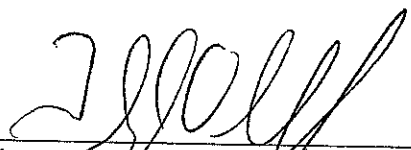
I, Thomas J. Obrokta, Jr., counsel to the BrickStreet Mutual Insurance Company, do hereby certify that a copy of the foregoing **"Respondent BrickStreet Administrative Services Response IN Opposition to Petitioner's Petition for Writ of Mandamus"** was served by REGULAR U.S. MAIL upon the following parties of record this 19th day of April, 2007:

Jerome J. McFadden, Esq.
214 South Walker Street
Princeton, WV 24740

B&G Trucking Company, Inc.
Rt. 2 268
Bluefield, VA 24605

Mary Jane Pickens
West Virginia Office of Insurance Commissioner
PO Box 50540
Charleston, WV 25304

David L. Stuart
Workers' Compensation Litigation Division
PO Box 4318
Charleston, WV 25364-4318



Thomas J. Obrokta, Jr. (#6645)

STATE OF WEST VIRGINIA

EXECUTIVE DEPARTMENT

At Charleston

A PROCLAMATION

By the Governor

I, **JOE MANCHIN III**, GOVERNOR of the State of West Virginia, by virtue of the authority vested in me by Article 2C, Chapter 23 of the Code of West Virginia, do hereby proclaim as follows:

WHEREAS, an unfunded liability has existed in the Workers' Compensation Fund of such critical proportions that it constitutes a substantial deterrent to the economic development of this State;

WHEREAS, there has in the past been short-term and long-term crises in the State-run workers' compensation monopolistic system;

WHEREAS, over the course of these crises, employers in West Virginia have found it increasingly difficult to afford rates charged by the Workers' Compensation Commission for workers' compensation coverage and that paying said rates adversely impacts employers' ability to compete in a global economic environment;

WHEREAS, the cost of obtaining workers' compensation coverage from the State of West Virginia has impacted decisions by employers in this State to shut-down, downsize, or relocate outside the State and has served as a disincentive to attracting new businesses into this State;

WHEREAS, over the course of these crises, employees in West Virginia have been unable to timely receive compensation for workplace injuries as defined in Chapter 23 of the Code of West Virginia (the "Code of West Virginia" shall hereinafter be referred to as the "Code");

R's EXHIBIT 1

WHEREAS, it is of utmost importance to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of Chapter 23 of the Code;

WHEREAS, on the 18TH day of January, 2005, I, as Governor of the State of West Virginia, issued a proclamation convening the Legislature of West Virginia into Extraordinary Session to provide an enduring solution to the current workers' compensation crisis afflicting this State;

WHEREAS, during the 2005 First Extraordinary Session, the Legislature of West Virginia took bold action and provided great leadership for the citizens of this State by enacting Senate Bill 1004, which provided a revenue stream sufficient to satisfy the unfunded liabilities of the Workers' Compensation Fund and provided for the privatization of West Virginia's State-run workers' compensation monopolistic system;

WHEREAS, through this collaborative effort by the Legislative and Executive Branches of State Government, a plan is now in place to provide an enduring solution to the workers' compensation crisis currently afflicting our State;

WHEREAS, the Insurance Commissioner, the Workers' Compensation Commission, and various other officials from State Government have worked diligently since the First Extraordinary Session to implement the provisions of Senate Bill 1004;

WHEREAS, the Executive Director of the West Virginia Workers' Compensation Commission has established, pursuant to Section 2, Article 2C, Chapter 23 of the Code, the West Virginia Employers' Mutual Insurance Company by obtaining the approval of the Insurance Commissioner of Bylaws and Articles of Incorporation and obtaining a certificate of incorporation with the West Virginia Secretary of State;

WHEREAS, the Executive Director of the West Virginia Workers' Compensation Commission obtained the approval of the Insurance Commissioner of amended Bylaws and Articles of Incorporation

for the West Virginia Employers' Mutual Insurance Company pursuant to legislation enacted during the Fifth Extraordinary Session of the Legislature during the year two thousand five;

WHEREAS, the West Virginia Employers' Mutual Insurance Company will do business as BrickStreet Mutual Insurance Company (the "Company");

WHEREAS, it is anticipated that the Workers' Compensation Fund will have approximately one billion, ninety million dollars (\$1,090,000,000) in assets on the thirty-first day of December, two thousand five;

WHEREAS, the funds in the Workers' Compensation Fund will be split and transferred to the Old Fund, the New Fund, the Uninsured Employers Fund, and the Self-Insured Guaranty Risk Pool;

WHEREAS, the Executive Director of the Workers' Compensation Commission has completed and submitted to the Insurance Commissioner a Comprehensive Financial Plan regarding the Old Fund that meets the requirements of Chapter 23 of the Code and said Comprehensive Financial Plan has been accepted by the Insurance Commissioner;

WHEREAS, providing for six hundred fifty million dollars (\$650,000,000) in assets in the Old Fund, as of the first business day in calendar year two thousand six, in combination with revenue sources secured during the First Extraordinary Session, will be sufficient to satisfy the liabilities of the Old Fund as they occur from time to time;

WHEREAS, the Insurance Commissioner has determined that the Company qualifies:

- (1) for a certificate of authority to transact workers' compensation and related lines of insurance in this State; and
- (2) for the authority to issue initially nonassessable policies of insurance pursuant to the Code.

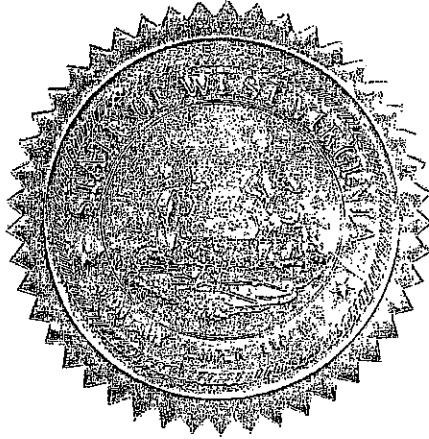
NOW THEREFORE LET IT BE PROCLAIMED AS FOLLOWS:

1. It is anticipated that the Workers' Compensation Fund will have approximately one billion, ninety million dollars (\$1,090,000,000) in assets on the thirty-first day of December, two thousand five;
2. The transfer of six hundred fifty million dollars (\$650,000,000) into the Old Fund, on the first business day of calendar year two thousand six, along with the revenue streams secured, will satisfy the Old Fund liabilities as they occur from time to time;
3. The Executive Director of the Workers' Compensation Commission has established a mutual insurance company pursuant to the Code;
4. The Executive Director of the Workers' Compensation Commission has submitted a Comprehensive Financial Plan for the Old Fund and such plan has been accepted by the Insurance Commissioner;
5. The Insurance Commissioner has determined that the West Virginia Employers Mutual Insurance Company qualifies:
 - (A) for a certificate of authority to transact workers' compensation insurance in this State; and
 - (B) for the authority to issue nonassessable policies of insurance pursuant to the Code;
6. The Workers' Compensation Commission shall terminate on the thirty-first day of December two thousand five, at 11:59 p.m.;
7. Prior to the thirty-first day of December, two thousand five, the Executive Director of the Workers' Compensation Commission shall arrange for the transfer of the two thousand five calendar year ending balance in the Self-Insured Guaranty Risk Pool currently within the Workers' Compensation Fund to the Self-Insured Guaranty Risk Pool created in Section 2, Article 2C, Chapter 23 of the Code; with said transfer to occur on the first business day of calendar year two thousand six;

8. Prior to the thirty-first day of December, two thousand five, the Executive Director of the Workers' Compensation Commission shall arrange for the transfer of six hundred fifty million dollars (\$650,000,000) from the Workers' Compensation Fund to the Old Fund; with said transfer to occur on the first business day of calendar year two thousand six and said transfer shall occur following the transfer referenced above into the Self-Insured Guaranty Risk Pool;
9. Prior to the thirty-first day of December, two thousand five, the Executive Director of the Workers' Compensation Commission shall arrange for the transfer of five million dollars (\$5,000,000) into the Uninsured Employers Fund from the Workers' Compensation Fund; with said transfer to occur on the first business day of calendar year two thousand six and said transfer shall occur following the transfers referenced above into the Self-Insured Guaranty Risk Pool and the Old Fund;
10. Prior to the thirty-first day of December, two thousand five, the Executive Director of the Workers' Compensation System shall arrange for and cause the transfer of any dollars remaining in the Workers' Compensation Fund into the New Fund and thus to the Company; with said transfer to occur on the first business day of calendar year two thousand six and said transfer shall occur following the transfers referenced above into the Self-Insured Guaranty Risk Pool, the Old Fund, and the Uninsured Employers Fund;
11. Two hundred million dollars (\$200,000,000) of the funds transferring to the New Fund are provided as an initial surplus to the Company; therefore, such two hundred million dollars shall be subject to a surplus note and shall be repaid from time to time, in accordance with such Surplus Note by the Company to the State of West Virginia for the benefit of the Old Fund;
12. The provisions of the Surplus Note providing for the capitalization of the Company have been approved by the Insurance Commissioner;


13. The remaining two hundred million dollars (\$200,000,000) transferring to the Company are being provided to satisfy and provide for the liabilities that the Company is assuming;
14. Any amount transferred to the New Fund in excess of four hundred million dollars (\$400,000,000) shall be subject to the Surplus Note referenced above and repaid immediately by the Company to the State of West Virginia for the benefit of the Old Fund as more fully provided in said Surplus Note;
15. The Executive Director of the Workers' Compensation Commission shall cause the transfer of the two thousand five calendar year ending balance in the employer excess liability fund to the Company, with said transfer to occur on the first business day of calendar year two thousand six;
16. The Investment Management Board, the Auditor, the State Treasurer and any other State agency or board are requested to fully cooperate in the transfer of assets identified in this Proclamation;
17. The Company's initial Board of Directors shall include the following appointments:
 - (A) David Rader, Chief Executive Officer, West Virginia Mutual Insurance Company, 500 Virginia Street East, Suite 1200, Charleston, West Virginia, 25301;
 - (B) Thomas V. Flaherty, Flaherty Sensabaugh & Bonasso, 200 Capitol Street, Charleston, West Virginia, 25301;
 - (C) H. Skip Tarasuk, Jr., Davis & Tarasuk Insurance, 1543 Fairmont Avenue, Suite 101, Fairmont, West Virginia, 26554;
 - (D) Stephen G. Roberts, President, West Virginia Chamber of Commerce, 1624 Kanawha Boulevard, East, Charleston, West Virginia, 25311; and
 - (E) Steven F. White, Partner, Goodwin & Goodwin, LLP, 1500 One Valley Square, Charleston, West Virginia, 25328.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of West Virginia to be affixed.



By The Governor

DONE at the Capitol in the City of Charleston, State of West Virginia, this the eighth day of December, in the year of our Lord, Two Thousand Five, and in the One Hundred Forty-Third year of the State.


GOVERNOR


SECRETARY OF STATE